Second Circuit Recognizes Sexual Orientation as Protected Characteristic Under Title VII

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On February 26, 2018, an en banc\(^1\) Court of Appeals for the Second Circuit considered whether sexual orientation was protected under Title VII of the Civil Rights Act (Title VII) in a suit brought by the estate of Donald Zarda against Zarda’s former employer, Altitude Express, Inc. The court held that sexual orientation is a characteristic inextricably linked to sex and thus discrimination on the basis of sexual orientation in employment violated Title VII.\(^2\) The court’s decision, which overturned significant precedent,\(^3\) was motivated in part by the Equal Employment Opportunity Commission’s (“EEOC”) decision in Baldwin v. Foxx,\(^4\) which determined that a claim of sexual orientation discrimination is inherently a claim of discrimination on the basis of sex, as sexual orientation is a “sex-based consideration.”

**Background**

Donald Zarda worked as a sky-diving instructor for Altitude Express. His duties included participating in tandem sky-dives with customers. Zarda often attempted to comfort female customers, apprehensive about the close physical proximity of a tandem dive (where the instructor’s chest is strapped to the customer during the dive,) with a male instructor by disclosing the fact that he was gay.

In 2010, a female customer accused Zarda of touching her inappropriately and then disclosing his sexual orientation to excuse his behavior. Altitude Express fired Zarda, and he filed an EEOC claim stating that he was fired due to his sexual orientation. He subsequently filed a federal law suit. The district court, citing Simonton, granted summary judgment to Altitude Express, concluding that “although there was sufficient evidence to permit plaintiff to proceed with his claim for sexual orientation discrimination under New York law, plaintiff had failed to establish a prima facie case of gender stereotyping discrimination under Title VII.”

After the EEOC decided Baldwin, Zarda moved to have his claims reinstated. The district court denied the motion and Zarda appealed in federal court, arguing that legal precedent should be overturned in light of Baldwin. While the appeals panel declined to revisit precedent, the panel acknowledged Zarda had standing to appeal and ordered an en banc hearing.

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\(^1\) Circuit Courts of Appeals decisions are typically rendered by three-judge panels drawn randomly from the pool of circuit court judges in the relevant circuit. En banc sessions are heard by every judge in the circuit. These sessions are typically reserved for rehearing a decision by one of the court’s panels which conflicts with the court’s prior decisions or in matters of extreme public importance.

\(^2\) Zarda v. Altitude Express, Inc., 883 F. 3d 100 (2nd Cir. 2018).

\(^3\) Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000) and Dawson v. Bumble & Bumble, 398 F.3d 211, 217-23 (2d Cir. 2005).

\(^4\) EEOC Decision No. 0120133080, 2015 WL 4397641 (July 15, 2015).
Court’s Discussion
The court utilized three analytical frameworks. First, by using the U.S. Supreme Court’s comparative test for sex discrimination, the court determined that “but for” Zarda’s sex, the adverse action he experienced (his termination) would not have occurred. Second, the court looked to Price Waterhouse v. Hopkins and assessed whether the discrimination was based on certain traits which were based in sex stereotypes.

Third, the court found that adverse action based on sexual orientation was analogous to race-based associational discrimination, which was prohibited by the court in Holcomb v. Iona College, 521 F.3d 130, 139 (2d Cir. 2008) and was also prohibited by the Fifth, Sixth, and Eleventh Circuits. Considering all three analyses, the court determined that sexual orientation discrimination is motivated, at least in part, by sex, and is thus a subset of sex discrimination prohibited by Title VII.

Significance
This decision deepens the divide on the issue of whether sexual orientation is protected under both Title VII and other civil rights laws prohibiting sex discrimination. The Second and Seventh Circuits, along with many states, cities, and municipalities, have determined that sexual orientation discrimination is prohibited, and, in its Baldwin decision, the EEOC concurred. However, other circuit courts have disagreed, the Department of Justice filed a brief supporting Altitude Express, and then-Attorney General Jeff Sessions voiced his opposition to the Zarda decision. While the Supreme Court has declined to address the matter to date, the current divide indicates a possible review in the future.

Until Congress acts or the Supreme Court considers the issue, the legality of sexual orientation discrimination under Title VII is dependent on location, though specific state statutes may be unequivocal. However, unless a religious-based reason exists, including a prohibition against sexual orientation discrimination in organization policy and procedure is undoubtedly best practice. Beyond creating a safe and inclusive culture, the rapid evolution of the legal landscape suggests that sexual orientation may be uniformly recognized as a protected characteristic in the near future.

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7 Evans v. Georgia Regional Hosp., 850 F.2d 1248 (11th Cir. 2017).